IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8677 OF 2005

Mrs.Pushpa Mukund Patankar .. Petitioner
Versus
Shrikant Ganesh Barve & Ors. .. Respondents

Mr.A.M.Kulkarni for petitioner
Mr.Mukund Barve respondent No.2 in person.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 16th February 2006.

P.C.

. By this petition under Article 227 of the Constitution of India, petitioner challenges the judgement and order dated 8th September 2005 delivered by 3rd Additional Dist.Judge Sangli in Misc.Civil Appeal No.47 of 2004.

2. A suit being Special Civil Suit No.180 of 1999 has been filed by petitioner who is original

plaintiff. Respondents are original defendants. Suit is for partition, separate possession and permanent injunction. Respondents have filed written statement and in turn raised counter claim. Both civil suit and the counter claim are pending. Petitioner plaintiff in her civil suit applied for temporary injunction and the trial court has allowed the said application and restrained defendant Nos. 1 and 2 to the suit, their servants, representatives and agents from causing any obstruction to the plaintiff's possession over the property till the final hearing of suit. A counter temporary injunction application preferred by defendant Nos. 1 and 2 was rejected. This order is delivered on 28th January 2004 by the trial court. The abovementioned Misc.Civil Appeals were filed aggrieved by the order passed by the trial court on temporary injunction application of petitioner plaintiff and counter temporary injunction application by defendant Nos. 1 and 2. By a

common judgement delivered in the Misc.Appeals, petitioner's temporary injunction application was rejected whereas the counter temporary injunction application by defendant Nos. 1 and 2 was granted. It is the petitioner plaintiff who is restrained from causing obstruction to the possession of defendant Nos. 1 and 2 in the suit bungalow till decision of the main suit.

3. At the initial stage when this matter was placed before me, I was of the view that it being a family dispute, it should be mutually and amicably settled. However, that endeavour has not succeeded completely. It is in these circumstances, that I have considered the submissions of Mr.Kulkarni for petitioner original plaintiff.

4. He submits that the lower appellate court erred in allowing the application of defendant Nos. 1 and 2 and dismissing that of petitioner

original plaintiff virtually decrees the suit. The result is by sweeping observations, claim of petitioner plaintiff is disallowed and that of defendant Nos. 1 and 2, in the counter claim, is granted. Such orders and observations at an interlocutory stage are not warranted. That apart, he assails the findings as being contrary to the materials placed on record. It is not as if the petitioner plaintiff has no opportunity to substantiate her pleas with regard to her share in suit bungalow. The entire evidence is not necessary to be placed at this stage. In these circumstances, the order under challenge should be interfered with.

5. On the other hand, defendant Nos. 1 and 2 have supported the order under challenge and more particularly the prima facie findings therein that a partition has taken place as early as on 25th June 1968 and pursuant thereto, petitioner cannot claim any right, title and

interest in the property, it having lost its character as a joint family property.

6. In my view, the prima facie conclusion recorded by the lower appellate court on the basis of the documents produced viz., deed of partition and its contents is not liable to be interfered with, in my jurisdiction under Article 227 of the Constitution of India. More so, when it cannot be said to be vitiated by any error apparent or termed as perverse. The learned Additional Dist.Judge has perused the photocopies of the documents including those produced with list (Exh.27/2). He has recorded a finding of fact at a prima facie stage that the deed evidenced partition. When a document relied upon is of 25th June 1968 and the case is that the partition is oral and subsequently reduced into writing, then, it is not necessary to issue injunction as prayed for by petitioner original plaintiff. Further, the lower appellate court

has recorded that the petitioner original plaintiff is not in actual possession of the suit bungalow.

7. That neither the appellants before the lower appellate court were in physical possession is not something which would support the case of petitioner, original plaintiff. In these circumstances, the order under challenge need not be interfered with.

8. The impugned order to the extent it temporarily restrains petitioner herein from causing obstruction to possession of appellant Nos. 1 and 2 (original defendant Nos. 1 and 2) in the suit bungalow till hearing and final disposal of the suit is not liable to be interfered with and thus stands confirmed.

9. However, at this stage, it would be appropriate to record the without prejudice offer

made by original defendant Nos. 1 and 2 of depositing a sum of Rs.1.50 lakhs in the trial court within a period of two weeks from today. This amount to be invested by the trial court in appropriate scheme which would fetch a sizable rate of interest depending upon the guidelines issued in that behalf. The said amount to be invested till final disposal of the suit. Thereafter, it would abide by such orders and directions as are issued by the trial court. Needless to state that merely because of the fact that such an amount is deposited and without prejudice offer of original defendant Nos. 1 and 2 noted by this Court does not mean that petitioner is in any manner prejudiced and she can, irrespective of such acts of defendant Nos. 1 and 2 assert her pleas in the suit and claim appropriate reliefs based thereon. All contentions in that behalf of both sides are expressly kept open. Order of the lower appellate court stands substituted to this

extent.

10. Save and except the above, petition dismissed. Trial court should not in any manner be influenced by the observations of the lower appellate court in the order under challenge and it is clarified that they are prima facie. They need not influence the trial court in taking cognisance of the pleas of both sides on merits.

11. Mr.Kulkarni states that the injunction restraining petitioner plaintiff from obstruction possession of original defendant Nos. 1 and 2 is contrary to the finding of the Additional Dist.Judge viz., that even the appellants before me are not in physical possession of the suit bungalow. However, in my view, it is not as if the lower appellate court has not taken cognisance of the documents placed before it viz., tax receipts and other payments for maintainance of the suit bungalow. It is on that

basis the ultimate injunction is granted. However, the same does not preclude petitioner from contending that physical possession was always with the appellants original defendant Nos. 1 and 2.

(S.C.DHARMADHIKARI, J)